SUPREME COURT, U. S.

OCT 11 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-270

CLAUDE KELLEY, Director of the Department of Conservation, et al., etc.,
Petitioners,

v.

MOBIL OIL CORPORATION, a New York Corporation,
Respondent.

REPLY BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STATEMENT OF THE ISSUES

1. Whether or not Petitioners have alleged sufficient reasons to confer on this Court jurisdiction to review the judgment or decree of the Fifth Circuit Court of Appeals by Writ of Certiorari?

2. Whether the Fifth Circuit Court of Appeals properly ruled that the United States District Court had jurisdiction in this case?

STATEMENT OF THE CASE

This suit was filed in the United States District Court for the Southern District of Alabama, on August 9, 1972, by Mobil Oil Corporation (hereinafter called Mobil). The suit arises out of four leases, numbered 347, 348, 349 and 350, of land in Mobile Bay granted, after competitive bidding, to Mobil by the Director of the Department of Conservation, and after approval by the Governor of the State of Alabama.

This suit sought among other relief, a declaratory judgment by the Court determining the rights of the parties under the terms of the certain oil and gas leases granted by the State of Alabama to Mobil. The suit sought preliminary and permanent injunctions against Claude Kelley and the Department of Conservation, from failing or refusing to grant an extension of time concerning the leases, and that the Court would order that the leases remain in a status quo position.

Additionally, the suit sought preliminary and permanent injunctions against the State Oil and Gas Board of Alabama, the members of the Board, Drexel Cook, Julian Maddox, Ralph Adams, and the Supervisor of the Board, Philip LaMoreaux, from failing and refusing to grant drilling permits to the plaintiff to drill wells on the property covered by the leases.

The suit also prayed that the Court would grant to Mobil such general relief as to which Mobil may be shown to be justly entitled.

On August 29, 1972, Defendants-Petitioners, Department of Conservation, Claude Kelley and William J. Baxley, filed a motion to dismiss the complaint. On September 29, 1972 the Court heard argument on the motion to dismiss and a hearing was held, evidence taken, arguments made and briefs submitted on Mobil's motion for a preliminary injunction. The jurisdiction

of the Court was questioned in the motion to dismiss filed by Defendants-Petitioners, and was fully argued and briefed.

The Court, after considering the evidence taken, arguments made and briefs submitted, entered an order on January 11, 1973, staying the obligations and payments due under the four (4) leases until three (3) years and seventy-six (76) days after the Oil and Gas Board has issued a valid permit, and the Court extended the terms of the four (4) leases by staying the running of the primary terms of the leases from August 9, 1970, until the date the Oil and Gas Board issues a valid drilling permit, and an additional two (2) years after the primary term, if there is drilling. The Court retained jurisdiction of the case. Costs were taxed against the Defendant, Department of Conservation, State of Alabama. (A copy of the District Court's Judgment and Decree is set out as Appendix "B" to the Petition for Writ of Certiorari, pages 24-32.)

On February 12, 1973, all Defendants-Petitioners filed a notice of appeal from so much of the Judgment and Decree of the District Court "as granted Plaintiff's claim for an injunction staying Plaintiff's obligation and payment due under leases and extending the leases by staying the primary terms of the leases."

The notice of appeal to the Fifth Circuit Court of Appeals did not raise the question of jurisdiction of the District Court.

The appeal was briefed and argued, and on May 6, 1974, the Fifth Circuit Court of Appeals entered its opinion affirming the judgment of the District Court, and ruled that the District Court had jurisdiction of the case. (See Appendix "A" of Petition for Writ of Certiorari for Court of Appeals opinion, pages 14-23).

An application for rehearing was filed by Petitioners, and an order was entered by the United States Court of Appeals for the

Fifth Circuit on June 14, 1974 denying the Petition for Rehearing. (See Appendix "C" of Petition for Writ of Certiorari, page 33).

STATEMENT OF THE FACTS

The "Findings of Fact" entered by the District Court in its order of January 11, 1973, correctly states the facts of the case, and the District Court's "Findings of Fact" are set out in full at pages 27-30 of Petitioner's Petition for Writ of Certiorari, and is incorporated herein by reference, as if fully set out herein.

ARGUMENT

The complaint filed in this case invoked jurisdiction in the District Court pursuant to 28 U.S.C. Sec. 1331 (Federal Question), 28 U.S.C. Sec. 1332 (Diversity of citizenship), and Amendment Fourteen, Sec. 1, United States Constitution (deprivation of property without due process).

A. The District Court Was Correct in Finding That It Had Federal Question Jurisdiction Under the "Due Process" Clause of the Fourteenth Amendment and the Fifth Circuit Court of Appeals Was Correct in Affirming the District Court's Jurisdiction.

After conducting a hearing, taking oral evidence, and considering arguments and briefs of law submitted by counsel for all parties, the District Court found that Mobil's complaint stated a case arising under federal law and a necessary implication of that finding is that Mobil would be deprived of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, unless relief was given. On the appeal to the Fifth Circuit Court of Appeals the Petitioners joined issue only with the District Court's finding that there was federal jurisdiction over this controversy, and issue was not taken with the Judgment and Decree of the District Court after jurisdiction was found to exist. For the purposes of the appeal, it was taken, assuming proper jurisdiction, that the District Court's findings of fact, its application of the law to those facts, and its resulting Judgment and Decree based on those findings of fact and the law was correct and within its authority.

In finding that it had jurisdiction over this cause the District Court properly pointed out that any discussion of federal ques-

tion jurisdiction under 28 U.S.C. Section 1331[1] must necessarily begin with the Supreme Court's pronouncement in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946):

> ". . . Where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit.
>
> * * * * * * *
>
> "The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

In citing the case of *Bell v. Hood*, Professor C. A. Wright notes in his Treatise on Federal Courts (1963) at page 55 that federal jurisdiction exists if the complaint states a case arising under federal law even though on the merits the complainant may be proved to have no federal right. Wright points out that if the claim is bad, then:

> "Judgment is to be given against him on the merits, and even if the court is persuaded that federal law does not

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[1] § 1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district courts may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. As amended July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

> give the right the party claims, it is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction." *Wright on Federal Courts*, page 55.

In further considering Professor Wright's commentaries the District Court noted in this case that Professor Wright stated more succinctly but no less emphatically than the Supreme Court in *Bell v. Hood* that:

> "Dismissal for want of jurisdiction is appropriate only where the federal claim is frivolous or a mere matter of form."

The determination of whether or not a suit arises under the Constitution or laws of the United States rests upon "the plaintiff's statement of his own cause of action." *Louisville & Nashville RR Co. v. Mottley* (1908), 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126. See also other cases cited in the Fifth Circuit Opinion at page 15 of Petitioner's petition.

It would thus result that if Mobil's complaint stated a case arising under federal law that was not frivolous or a mere matter of form that the District Court would therefore have jurisdiction to consider Mobil's claim on its merits. In answering this question the District Court correctly looked to the verified complaint and noted that Mobil alleged that its property had been taken without due process of law in violation of the Fourteenth Amendment in that the State of Alabama acting through its Department of Conservation had, for a very substantial consideration, granted leases of certain water bottom property to Mobil for the express purpose of Mobil drilling for oil and gas on the leased property. The District Court also considered the evidence presented at the hearing concerning the actions or inactions by the Petitioners, arguments made and briefs submitted. The Court, in discussing the actions of the State, noted:

> "It is clear from the history of the Department of Conservation's issuance of permits under its oil and gas leases and from the content of the oil and gas leases in question, that it was contemplated by the parties at the time the subject leases were made that Mobil would have the right to drill. It would indeed be a strained construction of the lease arrangements to arrive at a conclusion which would in effect hold that the plaintiff received, and the defendant State Department of Conservation gave no more than a lottery ticket, a chance, for the right to drill for oil and gas".

The District Court noted that the Oil and Gas Board had not issued a drilling permit to Mobil even though almost two years had elapsed since the filing of a proper application therefor, and even though Mobil's application had not been questioned. A drilling permit is a prerequisite before Mobil can commence drilling. Up until the time Mobil applied for the permit in the instant case the issuance of drilling permits by the State Oil and Gas Board was a routine administrative matter. As a matter of fact two permits to drill in Mobile Bay had been administratively granted by the Board's staff prior to Mobil's application. The failure of the Oil and Gas Board to issue the requisite drilling permit effectually deprived Mobil of its property right to drill for oil and gas on the leased property.

The District Court found that Mobil had been deprived of the property right granted by the lease agreements, and it was the opinion of the Court, that, as a matter of equity, and to prevent unjust enrichment of the State, that Mobil was entitled to the relief for which it had prayed, by reason of the actions, or inaction of the Oil and Gas Board of the State of Alabama.

The question of the actions or inaction of the Attorney General was clearly before the Court and the Court found that the Attorney General had not unreasonably nor unlawfully inter-

fered with the activities of the State Oil and Gas Board or the U. S. Corps of Engineers. This was a fact question for the Court, and the Court ruled on this question. The fact that the Court ruled that the Attorney General did not act improperly, does not take away jurisdiction. To hold otherwise would mean that after a case had been tried and defendant found not to be liable the case should have been dismissed in the beginning for lack of jurisdiction because the Court found that the Defendant did not do the act of which the plaintiff complained. This is not the law. (See *Wright, Federal Courts*, page 55, previously quoted at page 6 of this brief).

The District Court cited a number of cases[2] where the courts had sustained federal question jurisdiction in actions to enjoin the enforcement of conservation laws and orders of state agencies dealing with the production of oil and the classification of oil wells. It is respectfully submitted that even absent the cases cited by the District Court or even in the absence of any prior cases affirming federal question jurisdiction in situations similar to that presented by this case, that the facts of this case themselves are amply sufficient to support a finding of federal question jurisdiction under the authority of *Bell v. Hood*, supra.

The Petitioners attack the District Court's finding of federal question jurisdiction by taking the position that under the facts in this case the State, acting by and through its agencies, had in effect contracted with Mobil to lease certain property to Mobil, that in so acting the State placed itself in a non-governmental (or proprietary) capacity and that this suit therefore involves

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[2] *Railroad Commission v. Rowan & N. Oil Co.*, 310 U. S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940); *Henderson Co. v. Thompson*, 12 F.Supp. 519 (D.C. Tex. 1935); *Amazon Petroleum Corp. v. Railroad Comm.*, 5 F.Supp. 633 (E.D. Tex. 1934); *Whittington v. Smith*, 16 F.Supp. 448 (E.D. Tex. 1936); *Lindsley v. Natural Carbonic Gas Co.*, 162 Fed. 954 (C.C.S.D.N.Y.) (1908); *Herkness v. Iron*, 278 U.S. 92, 49 S.Ct. 40, 73 L.Ed. 198 (1928); *Merced Dredging Co. v. Merced County*, 67 F.Supp. 598 (S.D. Cal. 1946).

nothing more than a breach of contract dispute between two private parties. (Petitioner's brief, pages 5-10). In support of this argument the Petitioners cite the case of *Manila Investment Co. v. Trammell,* 239 U.S. 31 (1915) (which will be later shown in this brief to be factually dissimilar from the case at bar) and proceed to sum up this point of their argument by asserting that the refusal of the Department of Conservation to extend the leases was merely an exercise of right based solely upon the leasing agreement between Mobil and the Department and that the right was analogous to any right a private party would have in a similar contract situation. In taking this position the Petitioners are apparently attempting to assert that the Department of Conservation's refusal to extend the leases is the only complaint made by Mobil and that an extension of the leases was the only relief sought. Whereas an order extending the term of the leases was ultimately entered by the District Court as being deemed by the Court to be the appropriate relief under the circumstances, such relief was by no means the only relief sought. It is clearly shown in Mobil's amended complaint that in addition to seeking an extension of the leases, Mobil prayed for injunctions restraining the Oil and Gas Board and its officials from refusing to issue drilling permits and for affirmative relief in the form of an order directing these defendants to issue drilling permits. It was most assuredly the actions, or inaction of the Oil and Gas Board, an agency of the State not a party to Mobil's lease, which was a major source of Mobil being unconstitutionally deprived of its property right.

The action also sought an injunction against all the defendants enjoining each of them from interfering in any way with Mobil's application to drill a well in Mobile Bay, and the actual drilling of such well or wells in Mobile Bay.

In the case of *Manila Investment Co. v. Trammell,* 239 U.S. 31 (1915), cited by the Petitioners in support of their proposition that federal question jurisdiction does not exist inasmuch as the

present suit allegedly involves a mere contractual or leasing agreement, this Court pointed out that the entire ground of recovery in that case rested upon the allegation that certain state officers had contracted to sell lands to the complainants and later repudiated that contract and sold the land to others. The case at bar differs factually from the *Manila* case, supra, inasmuch as there has been a conveyance of the leasehold interest to Mobil, a completed transaction. There has been no repudiation of the leases by the State or the Department of Conservation, nor is this suit a petition to merely interpret the meaning of the leases. The uncontested facts in the case are that the State, through its Department of Conservation, leased the property in question to Mobil for a substantial consideration, that the leases are still in force, and that another agency of the State, the Oil and Gas Board, has failed to issue the requisite drilling permit contemplated by both the Department of Conservation and Mobil at the time of the making of the leases. It is clear that the failure of the Oil and Gas Board to act to Mobil's application to drill is unconstitutionally depriving Mobil of its lease-hold rights to drill, for which Mobil had, to the date of the complaint, paid the State an amount in excess of $118,000.00. (The money was paid to the Department of Conservation, but under Title 26, Section 179(56o), *Code of Alabama* 1940 (Recompiled 1958) the money has been paid into the general fund of the State of Alabama.) A federal question would have been stated against the Oil and Gas Board members under the alleged circumstances if Mobil's leases had been acquired from a non-governmental source and if only the Oil and Gas Board members had been named as defendants. Surely this jurisdiction over the Oil and Gas Board members is not lost by the fact that the leases were sold to Mobil by an agency of the State of Alabama.

In conclusion, it appears that the Petitioner's primary argument in opposition to the District Court's finding that there is federal question jurisdiction in this case is that in entering into the lease agreements with Mobil the State of Alabama, acting

through its Department of Conservation, was not acting as a state but rather as a non-state and that since only states can violate the Fourteenth Amendment there could be no violation in this case and consequently no federal question. It is respectfully submitted, however, that only a State can issue or refuse to issue a permit to drill for oil and gas within the State and that the State's refusal to issue such a permit under the uncontested facts in this case is action on the part of the State such as works an irreparable injury to Mobil and unconstitutionally deprives Mobil of its property rights without due process of law.

The remaining portions of the argument will correspond to the numbers and letters used by Petitioners in their Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Decision of the Court of Appeals Is Not in Conflict With Decisions of This Court.

A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Supreme Court Rule 19.

The only reason listed in Supreme Court Rule 19(b) which has been mentioned by Petitioners in their petition in support of the Court granting certiorari is that the Fifth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. No other reason has been presented by Petitioners.

The Eleventh Amendment to the United States Constitution does not bar a suit against state officials and agencies named as defendants in this lawsuit because such officials and agencies were acting in violation of the Fourteenth Amendment to the Constitution of the United States.

In the case of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), this Court established the proposition that the Eleventh Amendment to the Constitution of the United States was not controlling in preventing a suit against a state where the act of the state contravened the statutes or Constitution of the United States.

The uncontested facts in this case clearly disclose that a breach of contract vel non on the part of the State of Alabama acting by and through its Department of Conservation is not the determinative issue or the root of the infringement of the Constitutional rights of Mobil in this case. Four leases were sold by the State of Alabama (through its Department of Conservation) to Mobil. These leases granted to Mobil the right to ex-

plore for oil and gas in certain acreages of Mobile Bay. The leases were duly authorized and executed with each lease being for a five year term and as long thereafter as oil or gas might be produced from the leased property. The leases specifically grant to Mobil the right to drill on the property covered by the leases during their terms.

It is not contended by Mobil that the Department of Conservation breached the terms of the leases. It is rather contended that the State Oil and Gas Board, which must issue a drilling permit before drilling can commence, has unconstitutionally refused to issue a permit to Mobil under circumstances where Mobil's application is unquestioned, and where up until the time of Mobil's filing its application for a drilling permit such permits had been issued routinely by the Board's staff as an administrative matter. It is this refusal to issue the permit on the part of the State, acting by and through its Oil and Gas Board, that is claimed to be unconstitutional and against which relief is primarily sought.

Mobil's request that the Department of Conservation extend the terms of its lease prior to commencement of this suit and its prayer for such relief in this suit is asserted merely as a means by which the unconstitutional actions on the part of the State Oil and Gas Board might be remedied.

Only the State Oil and Gas Board can issue or refuse to issue a drilling permit. Under the uncontested facts in this case it is respectfully submitted that the refusal of the State Oil and Gas Board to issue a drilling permit to Mobil to drill on the leased premises has the real and practical result, if permitted to continue, of depriving Mobil of its property right without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States. Therefore, pursuant to the authority of *Ex Parte Young*, supra, the Eleventh Amendment to the United States Constitution is not controlling.

The Fifth Circuit Court of Appeals in discussing the Eleventh Amendment defense, pages 16-17 of Petitioner's Petition, clearly noted that "the state's immunity has been held not to shelter state officials from suit when it is claimed that their acts go beyond federal constitutional bounds, whether or not the constitutionality of the state statute is involved."

As further noted by the Court of Appeals:

> "A valid law may be wrongfully administered by officials of the state, and so as to make such administration an illegal burden and exaction upon the individual. *Reagan v. Farmers Loan & Trust Company* (1894), 154 U.S. 362, 14 S.Ct. 1047, 1051, 38 L.Ed. 1014." Other cases in support of this proposition are cited at page 17 of the Court of Appeals opinion.

Respondent submits that the Fifth Circuit Court of Appeals correctly applied this Court's ruling in *Ex Parte Young*, supra, and that the Eleventh Amendment does not bar this action against state officials in federal court.

This Court's decision in *Edelman v. Jordan*, . . . U.S. . . ., 39 L.Ed.2d 662, is not in any way applicable to the facts of this case. In the *Edelman* case this Court granted certiorari to review the question of whether or not a retroactive award of money payable to the Aged, Blind, and Disabled participants in an Illinois program should be allowed. This Court ruled that the District Court correctly exercised pendent jurisdiction over a statutory claim, and that prospective relief was permissible. This Court, however, ruled that retroactive relief of money awards could not be allowed because of the provisions of the Eleventh Amendment.

Mobil's complaint did not seek a monetary award, nor specific performance of a contract. The injunction issued in this case did not have any effect on the State of Alabama's reve-

nues, and did not require state officers to specifically perform. The leases had already been executed and they were completed in all respects.

Authorities will be cited in a later section of this brief in support of the proposition that under Alabama law state officials and agencies can be sued, and such suits are not in violation of Section 14 of the Alabama Constitution, the State Immunity Law.

Since under applicable law as set out in *Ex Parte Young*, supra, and subsequent cases, state officials and agencies can be sued in factual situations as in the case at bar, the decision of the Court of Appeals is not in conflict with other decisions of this Court, but is clearly supportive of this Court's opinions.

II. The Decision of the Court of Appeals Is Not in Conflict With United Mine Workers v. Gibbs, 383 U.S. 715 (1969).

In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1969), this Court, as did the Court of Appeals in its opinion in applying the *Gibbs* case to the factual situation in this case, noted that pendent jurisdiction existed whenever there is a federal claim and the relationship between it and the state claim arise out of a common nucleus of operative fact, and the federal court may adjudicate both claims in a single proceeding without requiring the parties to present the same facts to two different courts. *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148.

The District Court and the Court of Appeals found that there was a substantial federal claim and in the Court's discretion proceeded to grant relief, even though Respondent did not prove to the Court's satisfaction that it was entitled to relief based on its federal claim. The District Court and the Court of Appeals

further found that Mobil's claim against the officials of two state departments were inextricably interwoven and that they arose out of a common nucleus of operative facts.

This Court in *Gibbs*, supra, ruled that the District Court had not exceeded its discretion in proceeding to judgment on the state claim, and the Court of Appeals in the instant case ruled that the District Court had exercised its discretion wisely in determining that the Court had jurisdiction and granting complete relief.

Mobil submits that the instant case is in complete agreement with the finding in this Court concerning "pendent jurisdiction" in the *Gibbs* case, supra.

A. Mobil Oil's complaint did allege a substantial federal question.

The substantial federal question issue has been answered in Section A of this brief, in presenting argument that the District Court was correct in finding that it had federal question jurisdiction. The arguments presented at pages 5 to 12 under Section A are incorporated herein by reference at this point of the brief.

Mobil submits that the case of *Manila Investment Co. v. Trammell*, 239 U.S. 31 (1915), is inapplicable to the facts of the instant case, and that the authority of *Bell v. Hood*, 327 U.S. 678 and the other cases cited in Section A of this brief are controlling. This case involves substantially more than a contract action of the type involved in the *Manila* case, supra, since the *Manila* case was an effort to enforce an executory contract. In this case there was a completed conveyance of a property right which became vested upon the delivery of the lease. The federal question relief sought by Mobil was substantial

and required the Court to do more than merely determine rights under an executory contract. Mobil also sought injunctions against the Oil and Gas Board and its officials from refusing to issue drilling permits, sought an order directing the Oil and Gas Board to issue drilling permits and further sought an injunction against all defendants enjoining each of them from interfering in any way with Mobil's application to drill and the actual drilling of a well or wells in Mobile Bay.

The District Court found that it was clearly contemplated by the parties at the time the subject leases were made that Mobil would have the right to drill. The Court noted that it would indeed be a strained construction of the lease arrangements to arrive at a conclusion which would in effect hold that the plaintiff received, and the defendant State Department of Conservation gave no more than a lottery ticket, a chance, for the right to drill for oil and gas. The Court further noted that in reliance on the right to drill granted in the leases Mobil expended large sums of money, had pursued all avenues of relief available to it, and had fulfilled its obligations under the leases.

The Court noted further:

> "Since Mobil has been *deprived of the right* contemplated by the lease agreement, it is the opinion of this Court that, as a matter of equity, and to prevent unjust enrichment of the state, Mobil is entitled to have the terms of the leases stayed for the period which it is delayed in obtaining drilling permits by reason of the actions, or inaction of the Oil and Gas Board of the State of Alabama." (Emphasis added).

The above is clearly factual findings and discussions of alleged facts that show a violation of Mobil's "due process" rights. Petitioners are in error in stating at pages 9 and 10 of

their Petition that there were no factual findings or discussions indicating a possible violation of due process. Mobil submits that the fact that one state agency received in excess of $118,-000.00, contemplating that Mobil would be able to drill, and another state agency precluded Mobil from drilling, constitutes a patent example of a party being unconstitutionally deprived of its property rights without due process.

B. The State Immunity Clause as contained in Section 14 of the Alabama Constitution does not prohibit the District Court from entertaining this action.

Petitioners, in argument and brief in the Court of Appeals, stated that Section 14 of the Alabama Constitution prohibits the District Court from entertaining this action. This argument has also been made to this Court at pages 10 and 11 of Petitioner's petition. The District Court was presented full briefs on state law, to the effect that the Supreme Court of Alabama has determined that Section 14 of the Alabama Constitution is not applicable where a suit is brought against a state official or agency acting beyond his or its scope of authority or acting illegally, in bad faith, or fraudulently, *Curry v. Woodstock Slag Corp.*, 242 Ala. 379, 6 So.2d 479 (1942); and further that Section 14 is not applicable where a suit is brought against a state officer or agency to enjoin arbitrary action or abuse of discretion to prevent irreparable damage. *State of Alabama v. Norman Tobacco Co.*, 273 Ala. 420, 142 So.2d 873 (1962).

Mobil's complaint most assuredly alleges bad faith and fraudulent actions on the part of the State Attorney General and the fact that the District Court found that, in its opinion, the Attorney General had not acted fraudulently or in bad faith, would not retroactively destroy jurisdiction. *Wright, Federal Courts* (1963), page 55, cited above at page 6 of this brief.

Mobil's complaint further alleges arbitrary action on the part of the State Oil and Gas Board in refusing to grant the permit even though Mobil had complied with all the rules and regulations of the Board, and even though the Board had historically routinely granted permits to drill administratively.

Mobil also alleges in its motion for preliminary injunction that unless the Appellants were restrained that Mobil would suffer irreparable injury and harm. Facts in further support of the irreparable injury and harm which would be sustained by Mobil are fully shown in the verified complaint and by testimony presented at the hearing on Mobil's motion for preliminary injunction.

Mobil's complaint also alleged that the Petitioners were by their actions or inaction taking Mobil's property without due process of law and on this particular point the Alabama Supreme Court has declared in *Engelhardt v. Jenkins*, 273 Ala. 352, 141 So.2d 193, that:

> "The bill alleges an unauthorized procedure on the part of Appellant—the taking of private property in violation of the owners' constitutional right of compensation. Though the alleged taking was for the benefit of the state, such action, as alleged,' was without 'authority of law. *Even the state could not authorize an unlawful taking.*" (Emphasis supplied.)

In the *Engelhardt* case, supra, Jenkins brought an action seeking damages and an injunction against the State Highway Director from taking land without a proper condemnation proceeding and payment of just compensation. The single question presented was whether or not this was a suit against the State in violation of Section 14 of the Alabama Constitution. The State Highway Director confined his argument to this one point. The Court stated that if property was taken without proper condemnation proceeding and without paying

just compensation therefor "this is taking private property by the State without due process in violation of both State and Federal Constitutions—Sections 23 and 235, Alabama Constitution, 1901; United States Constitution, 14 Amendment, Section 1."

It is therefore clear under the facts alleged in Mobil's complaint and under the Alabama authorities cited above that Section 14 of the Alabama Constitution does not defeat this suit, and a federal court has jurisdiction.

Mobil submits that it is not necessary for the District Court to cite applicable state law in so applying that law to the facts of this case. The District Court applied applicable state law principles in deciding the state issues present in the case. Petitioners have not argued that the trial court decided the case in conflict with Alabama law.

C. **Petitioners were not denied fairness as litigants.**

Mobil Oil did not set out to invoke a Federal Court's pendent jurisdiction. Mobil stated a substantial federal question in its complaint, as is noted by both the District Court and the Court of Appeals in their respective opinions. The fact that the District Court did not find that Mobil was entitled to the federal relief prayed for, does not defeat the Court's jurisdiction. Under the authority of *Engelhardt v. Jenkins*, supra, *Curry v. Woodstock Slag Corp.*, supra, and *State of Alabama v. Norman Tobacco Co.*, supra, the result of the case would have been the same, applying the above cited Alabama cases.

Federal courts can decide state questions, if the relationship between the federal claim and the state claim dictates the conclusion that the entire action in the federal court comprises but one constitutional "case". *United Mine Workers v. Gibbs*, 383 U.S. 715, 725.

It was absolutely unnecessary for the Court of Appeals to remand this case to the District Court for application of Alabama law, since the findings of the District Court is completely compatible with applicable state law.

D. **Federal-State comity was not impaired.**

The judicial economy, convenience and fairness to litigants all required that this case be tried at one time, and that both federal and state claims be litigated in one "case". The state and federal claims presented by Mobil had a common nucleus of operative fact, and the District Court correctly decided the issues presented by the complaint and evidence. The state law concerning the right to sue state officials and agencies for acting beyond the scope of their authority, acting illegally, in bad faith or fraudulently, to enjoin arbitrary action, abuse of discretion, to prevent irreparable damage or to stop the taking of private property in violation of the owners' constitutional right of compensation are all grounds for relief in either the Alabama state court or federal court based on applicable state law.

E. **The District Court had diversity jurisdiction to entertain this suit against officers and agencies of the State of Alabama.**

It is respectfully submitted that the District Court was entirely correct in its finding that federal question jurisdiction exists in this case and for that reason no arguments by either the Petitioners or the Respondent relating to diversity jurisdiction need be considered by this Court. The issue of federal question jurisdiction was properly decided by the District Court, and, as correctly asserted by the District Court, once federal question jurisdiction has been found to exist, the question of diversity jurisdiction need not be reached. It is therefore submitted that the Petition for Writ of Certiorari should be denied

without considering diversity arguments and that the Opinion of the Fifth Circuit Court of Appeals should be affirmed.

In arguendo, however, Mobil will discuss the relative merits of diversity jurisdiction in this cause.

Although the District Court did not specifically rule on the question of diversity jurisdiction the findings of fact clearly disclose that there were ample grounds on which diversity jurisdiction could have been sustained pursuant to 28 U.S.C. 1332.[3] The District Court found, and the fact is not contested by the Petitioners in their Petition for Writ of Certiorari that Mobil Oil Corporation "is a New York corporation with its principal place of business being located in New York and is qualified to do business in the State of Alabama." The District Court further found that "the defendants, Claude Kelley, William J. Baxley, Drexel Cook, Julian Maddox, Ralph Adams, and Philip E. LaMoreaux, are each over the age of 21 years of age and are *citizens* of the State of Alabama." (Emphasis added.) Under these findings of uncontested facts, it clearly appears that each of these named defendants were *citizens* of the State of Alabama and that Mobil Oil Corporation is a *citizen* of the State of New York, thus giving rise to diversity.

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[3] 28 U.S.C. 1332 DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and foreign states or citizens or subject thereof; and

(3) citizens of different states and in which foreign states or citizens or subject thereof are additional parties.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

The only question remaining to be answered here would be that of whether the Defendants-state agencies (the State Oil and Gas Board and the Department of Conservation) would negate diversity by being construed to be one and the same as the State of Alabama. The question has been met head on by the Fifth Circuit in the case of *Board of Supervisors of Louisiana State University and Agricultural and Mechanical College v. Ludley*, 252 F.2d 372 (Fifth Cir. 1958), where the Board of Supervisors of LSU were sued by a Negro student seeking admission. There, an amendment to the State Constitution specifically sought to make the defendants (the Board of Supervisors of LSU and the Louisiana State Board of Education) special agencies of the state and withheld consent of the State of Louisiana to suits against the State through those defendants and their officers. In deciding this question the Fifth Circuit Court of Appeals stated:

> "These suits are not suits against the State of Louisiana, and no amount of assertion that they are can make them so. *Full relief can be obtained from the named defendants without requiring the State to take any affirmative action. This is the test.*" Page 376. (Emphasis supplied.)

This decision has been cited with approval and used by the District Court of the Northern District of Illinois in deciding *Patterson v. City of Chicago*, 176 F.Supp. 323 (1959), wherein that District Court cited with approval the above test, and further pointed out at page 324 that "another criterion frequently applied is that the state immunity operates only when the state itself rather than the entity named as defendant will have to respond to a judgment."

Mobil could have obtained relief by the Court either ordering the Oil and Gas Board to issue a drilling permit or ordering a suspension of the leases entered into between the Department of Conservation and Mobil, until such time as the permit was issued. Whereas the latter mode of relief was granted by the

District Court, either form of relief could have been rendered against the named defendants without requiring the State of Alabama to take any affirmative action whatsoever. Further, no monetary damages were sought in this lawsuit, and therefore there was no danger whatsoever that the State of Alabama itself would have to respond to any judgment of the Court.

Under the findings of fact as set forth by the District Court and as uncontested by the Petitioners in the Petition for Writ of Certiorari and under the test established by the Fifth Circuit Court of Appeals to determine whether a suit against a state agency is a suit against the state, it is submitted that diversity jurisdiction affirmatively exists. Mobil is a citizen of the State of New York, the individually named defendants are citizens of the State of Alabama, and the State agencies named as defendants meet the test of *Board of Supervisors of LSU v. Ludley*, supra, in that the prayer for relief can be obtained from those defendants without requiring the State of Alabama to take any affirmative action whatsoever.

In summary as to diversity, Mobil submits that even should this Court find that the District Court erred in finding federal question jurisdiction, such error was without injury as diversity jurisdiction is present in this suit, and the District Court correctly decided the issues presented.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the United States District Court for the Southern District of Alabama had jurisdiction in this case, and the United States Court of Appeals for the Fifth Circuit correctly ruled that the District Court had jurisdiction in this case, and the Fifth Circuit Court of Appeals order affirming the jurisdiction of the District

Court should be affirmed, and Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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